UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

JENNERSVILLE HOSPITAL, LLC	:	
	:	Case 04-CA-226116
	:	
and	:	
	:	
SEIU HEALTHCARE PENNSYLVANIA, CTW, CLC	:	

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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I. INTRODUCTION.

On May 2, 2018, Respondent, Jennersville Hospital, LLC ("Jennersville" or the "Hospital") withdrew recognition from SEIU Healthcare Pennsylvania ("SEIU" or the "Union"). Jennersville based its decision to withdraw recognition on two petitions signed by a total of fifty-five (55) of the eighty-eight (88) members of the bargaining unit represented by SEIU. Those petitions clearly stated that if 50% or more of the bargaining unit signed them, the employees were requesting that Jennersville withdraw recognition from SEIU. Because the signatures on those petitions represented a clear majority of the bargaining unit employees on the Hospital's payroll, Jennersville honored the expressed desire of a majority of its employees to no longer be represented by SEIU, and promptly withdrew recognition. Under *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717 (2001), Jennersville's decision was lawful because the petitions it had received provided the requisite objective evidence that the Union had lost majority support among bargaining unit members.

In his decision below, Administrative Law Judge Arthur Amchan bent over backwards to thwart the will of the Hospital's employees and force them to accept representation by a union they clearly no longer want. In doing so, the ALJ made up out of whole cloth an entirely new evidentiary standard an employer must meet before withdrawing recognition. Rather than requiring Jennersville to demonstrate by a preponderance of the evidence that it had "objective evidence" that the Union had lost majority support as required under *Levitz*, the ALJ applied a new "clear and unambiguous" evidence standard that is directly contrary to the Board's prior decisions holding that evidence proving the loss of majority support need not be "unambiguous." *See Wurtland Nursing & Rehab. Ctr.*, 351 NLRB 817, 818 (2007). The ALJ compounded that error by holding that signatures gathered during the time that the Hospital had different ownership were stale and could not support the withdrawal of recognition, even though those

same signatures unquestionably would have been valid to support an election. Moreover, to reach the conclusion that Jennersville did not have objective evidence that the Union had lost majority support, the ALJ relied principally on his own unsupported speculation about the motives of employees who were gathering signatures, and inexplicably discredited the unimpeached, clear and consistent testimony of the only employees who testified. Because the ALJ's decision is contrary to Board law and is supported only by his own biases against employees who have the temerity to want to rid themselves of a union with which they are displeased rather than the evidence in the record before him, Jennersville respectfully requests that the ALJ's decision be reversed and that the Board hold that Jennersville lawfully withdrew recognition from SEIU.

II. STATEMENT OF THE CASE

A. The Parties

Jennersville operates an acute care hospital located in West Grove, PA. (GC Ex. 1(c) at ¶ 2(a); GC Ex. 1(f) at ¶ 2(a)). In 2013, the Union was certified as the exclusive collective bargaining representative of the following unit (the "Unit"):

> All full-time, regular part-time and eligible per-diem technical and service and maintenance employees employed by Respondent at its facility located at 1015 West Baltimore Pike, West Grove, PA in the following classifications: Certified nursing assistant, licensed practical nurse, licensed practical nurse WO, nurse aide, computerized tomography (CT) technician, echocardiograph (Echo) technician, emergency department (ED) technician, electroneurodiagnostic (EEG) technician, histology technician, lab assistant, mammography technician, medical registrar, medical technician, medical technician PRN, medical technician WO, magnetic resonance imaging (MRI) technician, nuclear medical technician, pharmacy technician, radiology technician, radiology technician WO, respiratory therapist, respiratory therapist WO, scrub technician, surgical technician, surgical technician 1, ultrasound technician, cook, dietary aide, storeroom clerk and unit clerk.

(GC Ex. 1(c) at ¶¶ 5(a) and (c); GC Ex. 1(f) at ¶¶ 5(a) and (c)).

Prior to October 1, 2017, the Hospital was owned by CHS. (Tr. 17:1-3). On October 1, 2017, Jennersville purchased the assets of the Hospital and continued to employ a majority of employees in the Unit, thereby becoming a successor to CHS. (GC Ex. 1(c) at ¶ 5 (d) and (e); GC Ex. 1(f) at ¶ 5(d) and (e)).

B. The Course Of Bargaining After October 1, 2017

Jennersville did not assume the existing collective bargaining agreement with the Union, and entered into collective bargaining negotiations for a new agreement. (Tr. 17:19-25). The parties held four or five bargaining sessions at Jennersville, and another four or five at Chestnut Hill Hospital (another hospital purchased from CHS by Tower Health). (Tr. 18:11-23). The last bargaining session at Jennersville was held on March 26, 2018. (Tr. 19:2-3). The last bargaining session applicable to Jennersville employees held at Chestnut Hill took place on April 25, 2018. (Tr. 19:4-11).

On May 2, 2018, Alfred D'Angelo, the lead negotiator for Jennersville, contacted Steven Grubbs, the lead negotiator for the Union, and informed him that Jennersville had received a petition from what he believed to be a majority of Unit employees stating they no longer wished to be represented by the Union. (Tr. 19:17-22). Mr. D'Angelo also sent Mr. Grubbs an e-mail dated May 2, 2018, which stated in relevant part as follows:

> Management at Jennersville Hospital has been presented with petitions signed by over fifty (50) employees in the Bargaining Unit declaring that they no longer wish to be represented by SEIU. Since the signatures are well beyond 50% of the Unit, the Hospital, by this notification, is withdrawing recognition of SEIU as the bargaining representative of its employees.

(GC Ex. 2).

C. The Petitions

In mid-April and very early May, 2018, Mary Jo Ladish, who at the time had responsibility for Human Resources matters at Jennersville, received petitions from a Jennersville employee, Donna Rahner, stating that a majority of Unit employees no longer desired to be represented by the Union. (Tr. 23 – 25; Resp. Ex. 1 and 2). A list of Jennersville employees on the Hospital's payroll for the pay period ending April 28, 2018 was introduced at the hearing as Respondent's Exhibit 3. (Tr. 28:2-13; Resp. Ex. 3). A comparison of the petitions marked as Respondent's Exhibits 1 and 2 with the payroll list marked as Respondent's Exhibit 3 shows that of the eighty-eight (88) bargaining unit employees on the Hospital's payroll as of April 28, 2018, fifty-five (55) signed a petition at least once, and many signed two or more times.[1]

1. The August 2017 Petition

The first petition received by Ms. Ladish (the "August 2017 Petition) contained a cover page and 7 pages with signatures dated between August 14 and September 6, 2017. (Resp. Ex. 1). The first signature page was titled, "**PETITION FOR DECERTIFICATION (RD) – REMOVAL OF REPRESENTATIVE**." (Resp. Ex. 1) (Capitalization and Bolding in Original). Underneath that title was a pre-printed heading with blanks for the name of the employer and union, which read as follows:

> The undersigned employees of _____ (employer name) do not want to be represented by _____ (union name).
>
> Should the undersigned employees make up 30% or more (and less than 50%) of the bargaining unit represented by _____ (union name), the undersigned employees hereby petition the National Labor Relations Board to hold a decertification election

[1] Counsel for the General Counsel stipulated at the hearing that Respondent had provided signature exemplars from personnel records authenticating all of these signatures, with the exception of Amy Dworek's signature in April 2018. (Tr. 15:13-25).

> to determine whether a majority of employees no longer wish to be represented by this union.
>
> Should the undersigned employees make up 50% or more of the bargaining unit represented by _____ (union name), the undersigned employees hereby request that _____ (employer name) withdraw recognition from this union immediately, as it does not enjoy the support of a majority of employees in the bargaining unit.

(Resp. Ex. 1). On the first signature page of the August 2017 Petition, the employer name was filled in "JRH/CHS" (or Jennersville Regional Hospital/Community Health Systems) and the union name was filled in "SEIU." (*Id.*). Below the heading on the first signature page was a series of seven lines each having three blank spaces labeled "Signature," "Name (Print)" and "Date." (*Id.*). The first signature page was completely filled out with signatures of seven employees dated from August 14, 2017 to September 6, 2017. (*Id.*) Those employees were Semiha Cetin, Patsy Day, Kathy Reeder, Jean Hendrickson, Amy Dworek, Sandra Dunter and Les Craig. (*Id.*).[2]

The second signature page of the August 2017 Petition contained the same title and heading with the same information filled in identifying the employer as "JRH/CHS" and the union as "SEIU." That page contained another seven employee signatures all dated August 14, 2017. (Resp. Ex. 1). The employees who signed the second signature page were Bertice Montgomery, Theresa Haywood, Kristi Hagan, Loucinda Fuzi, Slavica Dizdarevic, Stephanie Bolas, and Susan Lechette. (*Id.*).[3]

The third signature page of the August 2017 Petition did not include the title and header. (Resp. Ex. 1). Instead, that page included a series of eleven lines with the same three blank

[2] Of those seven employees, one – Les Craig – was no longer on the Hospital's payroll as of April 28, 2018. (Resp. Ex. 3).
[3] Loucinda Fuzi and Stephanie Bolas were no longer on the Hospital's payroll as of April 28, 2018. (Resp. Ex. 3).

spaces for "Signature," "Name (Print") and "Date." The formatting and font for these signature lines were identical to the first two signature pages. (*Id.*). Eight employees signed the third signature page – Nancy Piscitelli, Jacqueline Ahern, Donna Rahner, Martha Mason, Maurice Reynolds, Pamela Atley, Jean Miles-Wilson and Sherry Broomell.[4] Although the third signature page did not include the same title and header, Donna Rahner testified at the hearing that when she signed the document on August 14, 2017, it was stapled to a page like the second signature page which "explained what we were signing." (Tr. 31:7-21). Ms. Rahner further testified that she would not have signed the blank signature page if it had not been attached to the page with the explanatory heading "because I wouldn't know what I was signing." (Tr. 31:22-24). According to Ms. Rahner, her intent in signing that page was to "hopefully decertify the union." (Tr. 32:7-8).

The fourth signature page of the August 2017 Petition also did not include the title and header found on the first two pages. (Resp. Ex. 1). Like the third signature page, the fourth page included eleven lines with spaces for an employee to sign, print their name and put the date he or she signed it. Again, the formatting and font for those signature lines were identical to the signature lines on the first two signature pages with the title and header. (*Id.*). Eleven employees signed the fourth signature page between August 15 and August 18, 2017. (*Id.*). Those employees were Holly Reyburn, Daniele Raysik, Kim McMahon, Carol Nichol, Barbara Corkadel-Markland, Karen Gane, Norman Quynn, Kerri Poore, Nancy Nolan, Joyce Howell and Kristin Weeks.[5] Holly Reyburn testified at the hearing that she signed the petition on August 15, 2017, and that when she did, "there was a top page that, if I go back, it's the page stating what

[4] All of these employees were still on the payroll as of April 28, 2018. (Resp. Ex. 3).
[5] All of these employees remained on the Hospital's payroll as of April 28, 2018. (Resp. Ex. 3).

we were doing by signing this paper." (Tr. 44:12-22; 44:23-45:2). According to Ms. Reyburn, the pages were stapled together and she read the header explaining the purpose of the petition before signing it. (Tr, 45:3-7). Ms. Reyburn testified that she understood her signature on the petition was "to get rid of the Union." (Tr. 45:12-14). Ms. Reyburn also testified that she witnessed the next four employees – Daniele Raysik, Kim McMahon, Carol Nichol and Barbara Corkadel-Markland – sign the petition of August 15, 2017 as well. (Tr. 45:22-46:3).

The fifth signature page of the August 2017 Petition included the same title and explanatory header as the first two signature pages. (Resp. Ex. 1). The only difference was that the employer name was spelled out as "Jennersville Regional Hospital." (*Id.*). That page was signed by seven employees between August 15 and August 21, 2017 – Michael Timbers, Jacqueline Yunker, Faye Hornyak, Sarah Hineman, Tiffany Hazelwood, Michael Keiter and Jennifer Dunn.[6]

The sixth signature page of the August 2017 Petition did not include the title and explanatory header. (Resp. Ex. 1). The sixth page included eleven lines with spaces for an employee to sign, print their name and put the date he or she signed it, and again, the formatting and font for those signature lines were identical to the formatting and font on the preceding page with the title and header. (*Id.*). Seven employees signed the sixth signature page between August 21 and August 31, 2017 – Lorraine Willis, Beth Gough, Joseph Dixon, Wayne Bloodgrod, Giuliana Mastrippolito, Jennifer D'Angelo and Nancy Arrowood. (*Id.*).[7] Jennifer D'Angelo testified at the hearing that she signed the sixth signature page of the petition on August 29, 2017, and that it was stapled to a page with the explanatory header when she signed

[6] All of these employees remained on the Hospital's payroll as of April 28, 2018. (Resp. Ex. 3).
[7] Of these employees, only Wayne Bloodgrod was no longer on the Hospital's payroll as of April 28, 2018. (Resp. Ex. 3).

it. (Tr. 52:7-53:2). Ms. D'Angelo further testified that when she signed the petition, her "intent was to get rid of the Union." (Tr. 53:3-8).

The seventh signature page of the August 2017 Petition included the same title and explanatory header as the first, second and fifth pages of the petition with the name of the employer filled in as "JRH/CHS" and the union as "SEIU." (Resp. Ex. 1). Two employees signed that page of the petition – Richard Ryan on August 30, 2017 and Kyle Boone on August 31, 2017. (*Id.*).[8]

2. The April 2018 Petition.

Ms. Ladish testified that Donna Rahner provided her with a second petition (the "April 2018 Petition") containing a number of additional pages with employee signatures in "very early May" 2018. (Tr. 25:1-8; 25:24-26:1). The April 2018 Petition was marked as Respondent's Exhibit 2. (Tr. 25:1-8; Resp. Ex. 2). Ms. Rahner gave this petition to Ms. Ladish in the HR department at the Hospital. (Tr. 25:9-13). When Ms. Rahner gave the April 2018 Petition to Ms. Ladish, the pages were clipped together. (Tr. 25:14-18).

The April 2018 Petition consisted of seven pages. (Resp. Ex. 2). The first three pages were in the same format as the August 2017 Petition. (Resp. Ex. 1 and 2). The first page of the April 2018 Petition contained the same title and header as the first, second, fifth and seventh signature pages of the August 2017 Petition (*Id.*). The only difference was that the name of the employer was filled in as "Jennersville Hospital/Tower Health." (*Id.*). The first page of the April 2018 Petition was signed by seven employees on April 3, 2018 – Giuliana Mastrippolito, Gonul Kece, Tiffany Hazelwood, Daniele Raysik, Holly Reyburn, Carol Nichol and Kim

[8] Both Mr. Ryan and Mr. Boone remained on the Hospital's payroll as of April 28, 2018. (Resp. Ex. 3).

McMahon – all of whom were on the Hospital's payroll as of April 28, 2018. (*See* Resp. Ex. 2 and 3).

The second page of the April 2018 Petition did not include the title and explanatory header. However, like the blank signature pages included in the August 2017 Petition, this page included eleven lines with spaces for an employee to sign, print their name and put the date he or she signed it, and again, the formatting and font for those signature lines were identical to the formatting and font on the preceding page with the title and header. (Resp. Ex. 2). The second page of the April 2018 Petition was signed by six employees – Jacqueline Yunker, Patsy Day, Cristina Blackford, Loan Tran (all of whom signed on April 4, 2018), Jean Hendrickson (who signed on April 25) and Jean Miles-Wilson (who signed on April 26). (*Id.*).[9] Loan Tran testified at the hearing that when she signed this petition on April 4, 2018, it was stapled to the previous page with the title and explanatory header. (Tr. 57:12-22).

The third page of the April 2018 Petition included the same title and explanatory header as the first page. (Resp. Ex. 2). This page of the petition was signed by seven employees between April 7 and April 26, 2018 – Joyce Howell, Barbara (Corkadel) Markland, Michael Rochester, Maurice Reynolds, Tiffany Furman, Kyle Boone and Bertice Montgomery, all of whom remained on the Hospital's payroll as of April 28, 2018. (Resp. Ex. 2 and 3).

The fourth page of the April 2018 Petition was in a different format than the previous pages, but included the same title and explanatory header. (Resp. Ex. 2). This page was signed by eight employees between April 4, 2018 and April 12, 2018 – Donna Rahner, Martha Mason, Jacqueline Ahern, Michael Timbers, Semiha Cetin, Norman Quynn, Jennifer Dunn and Kathleen Reeder, all of whom remained on the payroll as of April 28, 2018. (Resp. Ex. 2 and 3).

[9] Cristina Blackford was no longer on the Hospital's payroll as of April 28, 2018. (Resp. Ex. 3).

The fifth page of the April 2018 Petition appears to be a copy of the fourth page with three additional signatures added to the bottom. (Resp. Ex. 2). The additional signatures were from Harriett Younger, Amy Dworek and Karen Blair.[10]

The sixth page of the April 2018 Petition had the title and explanatory header, and was signed by five employees – Kimberly Baird, Amanda Dubois, Faye Hornyak, Jamie Kelly and Michael Keiter – all of whom were on the April 28, 2018 payroll. (Resp. Ex. 2 and 3).

The seventh page of the April 2018 Petition appears to be a copy of the sixth page, and included the first four signatures from that page. (Resp. Ex. 2). In addition, the seventh page also was signed by Richard Vincent, Tiffany Hazelwood, Kim Graham, Pam Atley and Norman Quynn, all of whom were on the April 28, 2018 payroll. (Resp. Ex. 2 and 3).

Thus, excluding employees who were no longer on the payroll as of April 28, 2018, a total of fifty-five (55) employees signed one or both of the August 2017 and April 2018 Petitions out of eighty-eight (88) employees on the April 28, 2018 payroll.

After receiving the two petitions, Ms. Ladish compared the signatures against a payroll list that she ran that day, and once she saw that the signatures represented a majority of the bargaining unit, she contacted the Chief Human Resources Officer for Tower Health, Russell Showers, who instructed her to send the petition to the Hospital's outside counsel and chief negotiator, Mr. D'Angelo. (Tr. 27:13-28:1). Mr. D'Angelo then notified Mr. Grubbs that the Hospital was withdrawing recognition from the Union based on the petitions it had received. (GC Ex. 2).

[10] The parties stipulated that the signature of Amy Dworek on this page could not be authenticated. (Tr. 15:18-25). Karen Blair does not appear on the Hospital's April 28, 2018 payroll. (Resp. Ex. 3).

III. STATEMENT OF QUESTIONS INVOLVED

(1) Whether the ALJ erred in holding that Jennersville did not establish that the Union had lost majority support at the time it withdrew recognition? (Exceptions 14, 15, 31)

(2) Whether the ALJ erred in holding that Jennersville could not rely on signatures on pages of the petitions that did not have a header explaining the purpose of the petition was to decertify the Union or allow Jennersville to withdraw recognition where the ALJ applied an incorrect legal standard and required that a document on which an employer relies in withdrawing recognition "must unambiguously state that the signers, constituting a majority of the bargaining unit, do not wish to be represented by the Union?" (Exceptions 9, 10, 12 through 15, 31).

(3) Whether the ALJ improperly discredited the unimpeached, consistent testimony of Donna Rahner, Holly Reyburn, Jennifer D'Angelo and Loan Tran that when they signed petition pages without a header, the page each of them signed was stapled to a page with a header explaining the purpose was to decertify the Union or authorize Jennersville to withdraw recognition and instead relied entirely on his own speculative, wholly-unsupported assumptions about the actions and motivations of these employees? (Exceptions 1 through 8, 11).

(4) Whether the ALJ erred in holding that Jennersville could not rely on signatures obtained in August 2017 when the Hospital had different ownership to support its decision to withdraw recognition on May 2, 2018 because those signatures were no longer valid? (Exceptions 12, 16 through 30)

(5) Whether the ALJ's issuance of a bargaining order was improper where the record established that even without the signatures the ALJ incorrectly held could not be counted, at least 35% of the bargaining unit had expressed a desire to be rid of the Union and there were no other unfair labor practices that would taint an election? (Exceptions 32 through 40)

IV. ARGUMENT

A. The ALJ Erred In Holding That Jennersville Did Not Establish That The Union Had Lost Majority Support At The Time It Withdrew Recognition. (Exceptions 14, 15, 31)

Under *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717 (2001), an employer is permitted to withdraw recognition of an incumbent union if the union has actually lost the support of the majority of bargaining unit employees. *Levitz*, 333 NLRB at 717, 725. A petition signed by a majority of the employees in the bargaining unit provides the necessary objective evidence of a loss of majority support that will justify the withdrawal of recognition. *Levitz*, 333 NLRB at 725; *Renal Care of Buffalo, Inc.*, 347 NLRB 1284, 1285-86 (2006); *Wurtland Nursing & Rehab. Ctr.*, 351 NLRB 817, 818-19 (2007).

The evidence presented at the hearing in this case established that at the time Jennersville withdrew recognition on May 2, 2018, it had received two petitions signed by a total of fifty-five (55) out of eighty-eight (88) bargaining unit employees. Both the August 2017 Petition and the April 2018 Petition included multiple pages with a header clearly explaining that if the employees signing the Petitions made up 50% or more of the bargaining unit represented by the Union, those signatory employees were requesting that the Hospital "withdraw recognition from the union immediately, as it does not enjoy the support of a majority of employees in the bargaining unit." (Resp. Ex. 1 and 2). The unrebutted evidence also established that when those Petitions were presented to Mary Jo Ladish in the Hospital's Human Resources Department, they were presented as a package, and the pages without a header were either stapled to or clipped to pages with a header. Moreover, the Hospital presented testimony from an employee who signed each of the pages that did not have a header, and each of those witnesses testified without rebuttal or any impeachment that at the time she signed the petition, the page she signed was attached to a page with the header.

Furthermore, there was no evidence presented that would support the conclusion that the Hospital had reason to believe that the signature pages without a header were not part of the same petition as the signature pages with the title and header to which they were attached. On the contrary, the signature lines on the pages with the header and those without the header are formatted exactly the same way – a series of lines labeled "Signature," "Name (Print)" and "Date" in the same font as the cover page – so that the pages without the header logically appear to be a continuation of the same document. (Resp. Ex. 1 and 2).

After receiving those Petitions, Mary Jo Ladish compared the signatures to a payroll list she ran that day, and once she saw that a majority of bargaining unit employees had signed at least one of the Petitions, she notified her boss and outside counsel for the Hospital. (Tr. 27:13-28:1). Jennersville then withdrew recognition. (GC Ex. 2).

Thus, at the time it withdrew recognition, Jennersville had two Petitions, each of which had a first page (and several other pages) stating that if a majority of employees signed, those employees were requesting that Jennersville withdraw recognition from SEIU. Those Petitions included the signatures of a clear majority of the bargaining unit (55 out of 88 employees). Thus, the Petitions Jennersville received unquestionably provided the Hospital with the requisite objective evidence under *Levitz* that the Union had lost majority support. The ALJ erred in holding that Jennersville failed to establish that the Union had lost majority support at the time Jennersville withdrew recognition, and his decision should be reversed.

B. The ALJ Erred In Holding That Jennersville Could Not Rely On Employee Signatures On Pages Of The Petitions That Did Not Include A Header Explaining The Purpose Of The Petition.
(Exceptions 9 through 15)

Because three of the pages of the August 2017 petition and one page of the April 2018 petition did not include the same header as the cover pages of each petition explaining that the

purpose of the petition was to hold a decertification election or, if enough employees had signed, to allow Jennersville to withdraw recognition, the ALJ ruled that it was improper for Jennersville to rely on the signatures on those pages. The ALJ's conclusion that Jennersville was not permitted to rely on employee signatures from both the August 2017 and April 2018 Petitions that appeared on pages without a header explaining the purpose of the petition is contrary to the Board's analysis of what constitutes objective evidence of a loss of majority support and defies common sense.

The ALJ's decision is based on a fundamental misreading of the law under *Levitz.* According to the ALJ, "[t]he document on which an employer relies in withdrawing ***must unambiguously state*** that the signers, constituting a majority of the bargaining unit, do not wish to be represented by the Union." (ALJ Decision at 5, lines 34-35)(emphasis added). This statement of the law is simply wrong. Contrary to the ALJ's analysis, the Board expressly held in *Wurtland* that "***Levitz does not require that the evidence proving loss of majority support be 'unambiguous.'*** An employer must prove loss of majority support by a preponderance of the evidence. … [T]he preponderance of the evidence standard 'simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.' The extent to which specific evidence is ambiguous is merely a factor to be considered in determining whether the employer has met the preponderance standard." *Wurtland*, 351 NLRB at 818 (internal citation omitted)(emphasis added).

In *Wurtland*, the Board concluded that a petition asking for a "vote to remove the Union" was sufficiently clear to support the employer's withdrawal of recognition. *Wurtland*, 351 NLRB at 817-818. In doing so, the Board rejected the ALJ's reading of the petition as requesting only a vote to determine whether to remove the union. According to the Board, the

employees "also gave a clear statement as to how they would vote – 'to remove the Union.'" *Id.* at 818. The Board further explained that there was no extrinsic evidence offered to support the ALJ's interpretation that the employees only wanted an election. *Id.* Accordingly, the Board concluded, "the Respondent here may rely ***upon the more reasonable interpretation*** of the petition's express reference to removal of the Union – that is, that a majority of the employees already had rejected the Union." *Id*. (emphasis added).

Thus, under *Wurtland*, an employer may rely upon a reasonable interpretation of an ambiguous petition to support a withdrawal of recognition. In this case, the ALJ's imposition of a requirement that every page of the petitions received by Jennersville had to "unambiguously state" that employees did not wish to be represented by the Union was directly contrary to the Board's teaching in *Wurtland.*

In support of his incorrect statement of the law, the ALJ cited four cases – *Highlands Regional Medical Center*, 347 NLRB 1404, 1406, (2006); *Liberty Bakery Kitchen, Inc.*, 366 NLRB No. 19, Slip Op at 1, n.1 (2018); *Anderson Lumber Co.*, 360 NLRB 538 (2014); *DaNite Sign Co.*, 356 NLRB 975 (2011). Not one of those cases calls for the "unambiguous evidence" standard the ALJ imposed in this case.

In *Highlands Regional*, nurses circulated a petition which read, "Highlands Regional Medical Center Showing of Interest For Decertification of Seiu Union Registered Nurses." *Highlands Regional*, 347 NLRB at 1410. In addition to the plain language of the petition, other evidence presented at the hearing in that case further demonstrated that the purpose of the petition had been only to obtain a decertification election, including testimony from several employees "that they signed the petition only after being told that the petition's sole purpose was to support a request for an election." *Id.* at 1406. Therefore, the Board concluded that "[i]n light

of ***all the circumstances***," the ALJ correctly concluded that the petition was not sufficient to establish that the employees no longer wanted union representation. *Id.* (emphasis added). Thus, in that case, the Board did not hold that it was unlawful for the hospital to withdraw recognition because the petition it relied upon was ambiguous. Rather, the Board found after considering all of the evidence, including evidence of what employees were told about the petition when they signed it, that the petition was expressly limited to requesting a decertification election.

In *Liberty Bakery*, the "petition" relied upon by the employer actually was a document prepared by the employer's outside counsel summarizing the procedures for a decertification election, which also included a short statement explaining that employers can withdraw recognition based on objective evidence of a loss of majority support. *Liberty Bakery*, 366 NLRB No. 19, Slip Op. at 5. Nine employees signed that summary of the law, which was then submitted to the employer. In response, the employer then provided language to the employee who submitted the signed summary for him to add to the page specifically stating that the employees were requesting that the employer withdraw recognition from the union. *Id.* at 6.

The ALJ found that the employer's withdrawal of recognition was unlawful. In doing so, however, the ALJ did not adopt an "unambiguous evidence" standard. On the contrary, the ALJ specifically recognized that an employer could rely on ambiguous evidence in withdrawing recognition: "The Board carefully examines the language on a petition, together with other objective evidence, ***to determine whether an employer could reasonably interpret the petition to establish that a majority of employees no longer support the union***. … But a respondent's reliance on ambiguous proof must be based on a reasonable interpretation of that proof in light of all the objective evidence." *Liberty Bakery*, 366 NLRB No. 19, Slip Op. at 10 (emphasis added). Ultimately, the ALJ explained, the employer's withdrawal of recognition in that case was

unlawful because "there is no statement of employees' intent – whether clear or ambiguous – on the signed page initially submitted to the Respondent in this case." *Id.*

The Board affirmed, and explained in a footnote, "In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by unlawfully withdrawing recognition from the Union, ***we emphasize that the document Respondent relied on in withdrawing recognition contained no statement of the employees' desires concerning union representation.***" *Liberty Bakery*, 366 NLRB No. 19, Slip Op. at 1, n.1. The Board then distinguished *Wurtland* on the grounds that the petition in that case "contained explicit language regarding employees' sentiments regarding representation." *Id.* Again, nothing in the Board's decision in *Liberty Bakery* can be interpreted as overruling its prior holding in *Wurtland* and declaring a stringent new "unambiguous evidence" standard for the withdrawal of recognition. Instead, both the ALJ and the Board simply recognized that the single sheet of paper signed by the employees in that case, which contained only a summary of Board law on the procedures for decertification and withdrawal of recognition, said nothing at all about whether the employees were requesting that the employer withdraw recognition.

In *Anderson Lumber*, the employer received written statements from eight of the fifteen bargaining unit members containing varying language stating that the individual employees, among other things, "would like to exit the union," "do not wish to be a part of the union," "do not wish to be a Union member" or "wish to get out of the Union." *Anderson Lumber*, 360 NLRB at 541. The ALJ found that these four statements unambiguously stated a desire to terminate union membership rather than a desire that the union no longer represent the unit. *Id.* at 542. As to the other four employee statements, the ALJ found that they were ambiguous but that "the more reasonable understanding of these statements is that these four employees no

longer desired to be represented by the Union." *Id.* at 543. However, because there were a total of eleven employees who either had not signed any statement indicating disaffection with the union or expressed only a desire to terminate their own membership in the union, the ALJ concluded that there was insufficient evidence to support the employer's withdrawal of recognition. *Id.* The Board affirmed the ALJ's analysis that four of the employee statements indicated only a desire to terminate union membership and, therefore, did not establish that these employees no longer wanted the union to represent them for purposes of collective bargaining. *Id.* at 538, n.1. Again, nothing in either the ALJ's or the Board's decision in *Anderson Lumber* required the employer to present unambiguous evidence of a loss of majority support. Instead, the decision in that case turned on the fact that four of the statements relied on by the employer unambiguously stated only that the employees wanted to terminate their membership in the union.

Finally, in *DaNite Sign*, a case also decided by Judge Amchan, the employer relied "solely on the fact that a minority of its bargaining unit members were dues paying members" of the union to justify its withdrawal of recognition. *DaNite Sign*, 356 NLRB at 979. In rejecting this basis for the employer's withdrawal of recognition, the ALJ cited longstanding Board precedent holding that there is "no necessary correlation" between union membership and union support. *Id.* at 980. Once again, neither the ALJ's decision in *DaNite Sign* nor the Board's subsequent decision affirming his conclusion that the employer unlawfully withdrew recognition contain any mention of a requirement that an employer must have "unambiguous evidence" of a loss of majority support before it can lawfully withdraw recognition from an incumbent union.

In sum, the ALJ's decision in this case that Jennersville lacked objective evidence that SEIU no longer enjoyed majority support among the bargaining unit was premised on a

requirement for "unambiguous evidence" that he made up out of whole cloth. The proper standard, as the Board explained in *Wurtland*, is whether Jennersville could prove a loss of majority support by a preponderance of the evidence, and whether Jennersville's interpretation of the petitions presented to it was reasonable.

Applying the proper standard, the preponderance of the evidence demonstrated that the Union in this case lacked majority support at the time Jennersville withdrew recognition on May 2, 2018. Ms. Ladish testified that she when she received the August 2017 and April 2018 Petitions the pages were stapled or clipped together. Thus, the pages lacking the header were presented to the Hospital together with the pages including the explanatory header as a package. And, the header pages contain crystal clear language stating that if a majority of unit employees sign the petitions, the employees were requesting that Jennersville withdraw recognition from the Union. There was no evidence presented at the hearing that would undermine the reasonableness of the Hospital's conclusion that all of the pages should be viewed as part of a petition expressing the desire of employees to be rid of the Union. Furthermore, the formatting of the pages lacking the header is identical to the formatting of the pages with the header, which further supports the reasonableness of the Hospital's conclusion that all of the pages should be viewed as part of a petition seeking the removal of the Union.

The petitions in this case could not reasonably be interpreted as merely seeking an election (as in *Highlands Regional*) or as expressing the desire of employees only to withdraw from union membership (as in *Anderson Lumber*), nor was there any evidence that the pages with the header were added to the petition after gathering signatures on the pages without the header (which would be akin to the facts of *Liberty Bakery*). Furthermore, there was no evidence that employees had been told that the only purpose of the petitions was to obtain an election, or

that there was a counter petition in support of the Union being circulated. Therefore, the only reasonable interpretation of the Petitions presented to Ms. Ladish was that all of the pages of each Petition should be viewed together as constituting a request by Jennersville's employees that the Hospital withdraw recognition once a majority of unit employees had signed.

The ALJ's derisive characterization of the pages lacking the explanatory header as "blank pieces of paper" simply ignores the evidence presented to him. First, the pages lacking the header were not completely blank. They had the same formatting and signature lines as the pages preceding them with the explanatory header and reasonably can be viewed as continuations of the signature lines on the header pages. Furthermore, the pages lacking the header were not submitted separately from the pages containing the explanatory header. All of the pages were submitted together and gave every appearance of being part and parcel of the same petition seeking to have the Union removed. The ALJ's conclusion that Jennersville could not rely on the pages of the Petitions lacking the explanatory header was contrary to the evidence presented, contrary to Board law, and should be reversed.

C. The ALJ Improperly Discredited The Testimony Of Every Employee Who Testified Without Providing Any Legitimate Reason For His Credibility Determinations.
(Exceptions 1 through 8)

To rebut the General Counsel's position, which was later adopted by the ALJ, that Jennersville could not rely on employee signatures on pages lacking an explanation that the purpose of the petition was to support a decertification election or, if enough employees signed, the withdrawal of recognition from SEIU, Jennersville called four employees to testify – Donna Rahner, Holly Reyburn, Jennifer D'Angelo and Loan Tran - each of whom signed one of the pages lacking a header and each of whom testified that the page she signed was attached to a page with a header. Despite the fact that the testimony of all four of these witnesses was

consistent and was unrebutted by any other evidence, the ALJ inexplicably refused to credit their testimony. The ALJ's credibility determinations had nothing to do with the demeanor of any of these witnesses, and were wholly unsupported by the record. Instead, the ALJ's credibility determinations were premised entirely on his own speculation about the actions and motives of these employees. The Board should reverse the ALJ's credibility determinations.

In *Standard Dry Wall Products, Inc.*, the Board explained, "[I[t is our policy to attach great weight to a Trial Examiner's credibility findings **insofar as they are based on demeanor**. Hence we do not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of *all* the relevant evidence convinces us that the Trial Examiner's resolution was incorrect." *See Valley Steel Products Co.*, 111 NLRB 1338, 1345 (1955) (quoting *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950)) (italicized emphasis in original; bolded added). This policy is grounded in the fact that, unlike the Board, the Trial Examiner (or now ALJ), by virtue of his direct observation of witnesses at the hearing, has the opportunity to observe and evaluate factors of appearance and demeanor of witnesses. *Valley Steel Products Co.*, 111 NLRB at 1345.

However, in contested cases, "the Act commits to the Board itself, not to the Board's Trial Examiner, the power and responsibility of determining the facts as revealed by a preponderance of the evidence." *Id.* Thus, the Board is not bound by the ALJ's credibility determinations, but bases its findings upon a *de novo* review of the entire record. *Id.* ("insofar as credibility findings are based upon factors other than demeanor, in consonance with the policy set forth in *Standard Dry Wall Products*, the Board will proceed with an independent evaluation"); *see also K-Mart Corp. v. NLRB*, 62 F.3d 209, 213 (7th Cir. 1995) (declining to uphold boilerplate credibility determinations) and *NLRB v. Cutting, Inc.*, 701 F.2d 659, 667 (7th

Cir. 1983) ("Where an ALJ's theory of credibility is based on inadequate reasons or no reasons at all, his findings cannot be upheld.").

Importantly, an employer "need not provide exhaustive proof corroborating the testimony of its witnesses to meet its initial burden." *Cutting, Inc.*, 701 F.2d at 669 (citing, *inter alia*, *White Glove Bldg. Maintenance, Inc. v. Brennan*, 518 F.2d 1271, 1275-76 (9th Cir. 1975)). "To require otherwise, in the absence of evidence directly or indirectly contradicting the proof, would be a gross misconception of the standard and an invitation to wholesale discrediting of uncontroverted testimony." *Cutting, Inc.*, 701 F.2d at 669. Rather, for an ALJ to discredit uncontroverted testimony, such testimony must be "inherently implausible or unworthy of belief." *Id.* (citing *Texaco Export, Inc. v. Overseas Tankship Corp.*, 477 F. Supp. 289, 297 (S.D.N.Y. 1979)). In this case, there was no evidence contradicting the testimony of the only employees who testified, each of whom testified without rebuttal or contradiction that the petition page she signed was attached to a page with a header when she signed it. There is nothing inherently implausible or unworthy of belief about that testimony. On the contrary, it defies common sense to conclude that employees signed a completely blank page with no explanation as to what they were signing without any evidence to establish that was what happened. As Donna Rahner explained, she would not have signed the page lacking a header if it was not attached to one with a header, "because I wouldn't know what I was signing." (Tr. 31:22-24).

In discrediting, the testimony of Ms. Rahner, Ms. Reyburn, Ms. D'Angelo and Ms. Tran, the ALJ repeatedly relied on pure speculation rather than any of the evidence in the record before him. For example, the ALJ concluded, without a shred of record support, that each of these employees "clearly understood that the lack of a heading on the pages they signed was a problem

for Respondent." (Decision p. 4, lines 19-20). There was no testimony offered by any witness that even touched on the issue of whether it was somehow problematic for Jennersville that pages of the Petitions were lacking a header. The same is true of the ALJ's conclusion that the testimony of Ms. Rahner, Ms. Reyburn, Ms. D'Angelo and Ms. Tran "that the blank pages were stapled to others with the decertification language was tailored to overcome this deficiency and not credible." (Decision p. 4, lines 20-22).

Indeed, the ALJ's own language demonstrates that he relied not on the evidence before him, but on his own extra-record speculation. In his decision, the ALJ repeatedly stated that the record "suggests" that the pages of the Petitions were not stapled together when employees signed them. For example, the ALJ specifically cited the testimony of Holly Reyburn and concluded that "Reyburn's testimony, in fact, suggests that she did not know for a fact that this was the case." (ALJ Decision p. 4, lines 22-23). But, the testimony of Ms. Reyburn quoted in the ALJ's decision does not support that conclusion at all. As the ALJ quoted, Ms. Reyburn testified as follows:

> Q. When you signed this document on August 15, 2017, were there any other pages with it, or was there only this page?
>
> A. No, there was a top page that, if I go back, it's page stating what we were doing by signing this paper.
>
> Q. Was it attached? Was it stapled, clipped, do you remember?
>
> A. From what I recall, it was stapled and it was together.

(Tr. 44:23 – 45:5). Importantly, the ALJ omitted the next question Ms. Reyburn was asked, and her answer:

> Q. Did you read that header before you signed it?
>
> A. Absolutely.

(Tr. 45:6-7). Nothing about Ms. Reyburn's testimony "suggests" anything other than exactly what she said, *i.e.,* when she signed the August 2017 Petition, the page she signed was stapled to the header page that preceded it, and she "absolutely" read the header before she signed the petition.

Likewise, the ALJ found it was "unlikely" that Ms. Rahner "recalls whether the blank sheet she signed in August 2017 was stapled to sheets stating the employees wished to decertify the Union." (Decision p. 4, lines 34-36). Again, nothing about Ms. Rahner's testimony supports the ALJ's speculation. After identifying her signature on the August 2017 Petition, Ms. Rahner testified as follows:

> Q. When you signed this document on August 14, 2017, were there any other pages with it, or was it just by itself?
>
> A. No, it was attached to a page like this that explained what we were signing.
>
> Q. Are you turning to the page that precedes it?
>
> A. Yes.
>
> Q. How was it attached?
>
> A. It was stapled.
>
> Q. Would you have signed that document if it wasn't attached to another document?
>
> A. No, because I wouldn't know what I was signing.

(Tr. 31:14-24). Nothing about this testimony makes it "unlikely" that Ms. Rahner did not accurately remember that the page she signed was stapled to a page with a header. Nor was her testimony rebutted in any way by any other evidence or testimony.

The ALJ likewise engaged in pure speculation in finding that because Ms. Rahner had "consulted with the National Right to Work Foundation … she surely understood that a blank sheet might present a problem for Respondent." (Decision p.4, line 40 and p.5, lines 1-2).

Contrary to the ALJ's speculation, there was no testimony whatsoever that Ms. Rahner ever discussed the issue of a page lacking a header with the National Right to Work Foundation. Ms. Rahner testified only that an attorney at the National Right to Work Foundation advised her that it was okay to give Jennersville the originals of the signed petitions, and that she had reached out to him after Jennersville was purchased by Tower Health. (Tr. 42:13-24). Ms. Rahner specifically testified that no one at the National Right to Work Foundation reviewed, or even saw, the signatures before she submitted the Petitions to Jennersville. (Tr. 43:2-5). Thus, the ALJ's conclusion that Ms. Rahner "surely understood that a blank sheet might present a problem for Respondent" was based on nothing but conjecture.

As to Ms. D'Angelo and Ms. Tran, the ALJ did not even bother to offer an explanation as to why he chose not to credit their testimony. Instead, the ALJ offered only the conclusory statement that "the circumstances surrounding the petitions suggests that the blank sheets were not stapled together." (Decision p. 4, lines 34-36). What those circumstances might be is a mystery because the ALJ did not bother to explain exactly what evidence "suggested" to him that the pages of the petitions were not stapled together when every witness testified that they were.

The same is true of his speculative assertion that the fact that not every employee signed a petition page with a header explaining the purpose of the petition "strongly suggests that employees circulating the petitions were not seeking an unambiguous declaration for decertification from the employees who signed a blank page, or were uncertain as to whether they could obtain a sufficient number of signatures on a 'heading' sheet." (Decision p. 5, lines 4-7). There was no testimony to support this conclusion. Not one of the witnesses who testified even hinted at the idea that the reason some of the pages lacked a header was because the employees were uncertain they could get their co-workers to sign a page with a header. Instead,

each of the employees consistently testified that the pages of the Petitions lacking a header were stapled to a page with a header explaining the purpose of the petition. The ALJ inexplicably chose to discredit this unrebutted testimony based on nothing but his own speculation.

D. The ALJ Erred In Holding That Jennersville Could Not Rely On Signatures On The August 2017 Petition.
(Exceptions 12, 16 through 30)

The ALJ held that the "petition signed in August 2017 is not a reliable indicator of employees' union sentiments as of May 2, 2018 when Respondent withdrew recognition." (ALJ Decision p. 6, lines 16-17). The ALJ's decision on this point is contrary to Board law and unsupported by the evidence presented at the hearing.

In holding that the August 2017 Petition was not a reliable indicator of employee sentiments at the time Jennersville withdrew recognition in May 2018, the ALJ broadly pronounced that "a petition signed 8 months previously does not establish that the Union had lost majority support or even that Respondent had a good faith reasonable doubt that the Union had lost majority support." (ALJ Decision p. 6, lines 17-18). The ALJ's decision is directly contrary to the Board's longstanding position with respect to the validity of signatures on a petition that may be used to determine whether a question concerning representation exists. The Board's Outline of Law and Procedure in Representation Cases ("Outline") addresses the issue of validity of signatures in the section dealing with how to determine whether a showing of interest has been made for purposes of conducting an election. As the Outline makes clear, the general rule is that signatures on a petition "must be dated and must be current." Outline at §5-500. With respect to what is meant by "current," the Outline explains that the Board has long held that signatures up to a year old are sufficiently current for purposes of determining whether a petitioner has made a sufficient showing of interest. *Id.* (*citing Carey Mfg. Co*., 69 NLRB 224, 226 n.4 (1946); *Northern Trust Co.*, 69 NLRB 652, 654 n.4 (1946); *Covenant Aviation Security, LLC*, 349

NLRB 699, 703 (2007)). Furthermore, as the D.C. Circuit reiterated in *McDonald Partners, Inc. v. NLRB*, 331 F.3d 1002, 1008 (D.C. Cir. 2003), "The Board has never dismissed evidence as stale based solely on its age; it has required changed circumstances or new evidence calling the reliability of the old evidence into doubt."

The signatures on the August 2017 Petition were gathered well within a one year period from the time they were presented to the Hospital. Thus, under the Board's longstanding rule regarding how long signatures on a petition retain their vitality, the signatures on the August 2017 Petition remained valid on May 2, 2018. In his decision, the ALJ made a half-hearted attempt to distinguish *McDonald Partners* saying, "in that case the court was reviewing a Board decision under a much more lenient standard of proof," *i.e.*, the "good faith reasonable doubt" standard. (ALJ Decision p. 8, lines 11-12). However, the standard of proof has nothing to do with length of a time a signature maintains its validity. Simply put, if signatures that are eight months old would be sufficiently current to support an election, there is no reason why those same signatures cannot support the withdrawal of recognition regardless of whether an employer has to show the actual loss of majority support or merely a good faith reasonable doubt.

To support his conclusion that the August 2017 signatures were stale, the ALJ relied almost entirely on *Hospital Metropolitano.*, 334 NLRB 555, 556 (2001). That case is clearly distinguishable. In *Hospital Metropolitano,* a successor employer that acquired the assets of a hospital at which a union represented six different bargaining units withdrew recognition in December 1998, approximately nine months after the asset sale. In doing so, the employer relied in part on a petition signed by a large number of unit employees in April, 1998. That petition stated:

> The undersigned below, all of the employees of Hospital Metropolitano, disallow Mr. Radames Quinones Aponte to

> represent us or to bargain any employment condition in our name. In addition, we will not authorize check-off dues [sic] in favor of [the Union] as an employment condition.
>
> This is our firm and voluntary decision.

Hospital Metrpolitano, 334 NLRB at 555 (bracketed text in original). While the Board characterized these signatures as stale, the Board's decision made clear that the petition "indicated that the signers were displeased with Quinones as their representative, not with the Union itself," and that in the interim Mr. Quinones had been replaced as the Union's negotiator. Citing these "significant changed circumstances," the Board concluded, "the employees' earlier statements indicating unhappiness with Quinones were not a reasonable basis for questioning the Union's majority support in December, when the Respondent withdrew recognition." *Hospital Metrpolitano,* 333 NLRB at 556.

Unlike the petition in *Hospital Metrpolitano,* the August 2017 Petition in this case was not directed at any individual union official. Instead, it was clearly directed at the Union itself, and expressly requested that the Hospital withdraw recognition from the Union if 50% or more of the Unit employees signed it. (Resp. Ex. 1). Moreover, unlike *Hospital Metropolitano*, there was no evidence of any changed circumstances in this case, other than the mere fact that the Hospital was acquired by Tower Health. There was no evidence that there was any change in employees' dissatisfaction with the Union. Thus, *Hospital Metropolitano* is thoroughly distinguishable and cannot justify the ALJ's decision to adopt a different standard for evaluating the validity of signatures on a petition that is at odds with the Board's longstanding rule.

In addition to getting the law wrong by holding that signatures that are eight months old are stale, the ALJ also justified his holding that Jennersville could not rely on the August 2017 Petition by manufacturing a new presumption that prohibits a successor employer from relying on signatures gathered under the ownership of a predecessor. According to the ALJ, *Murrysville*

Shop 'N Save, 330 NLRB 1119, 1120 (2000), "at least suggests that an employer may not rely on a decertification petition assembled for a prior employer." (ALJ Decision p. 6, lines 32-33). This is a willful distortion of the Board's decision in *Murrysville*. In that case, the Board held it was unlawful for a successor employer to refuse to recognize the union representing the predecessor's employees. The successor purchased the assets of the predecessor on October 3, 1997. More than a year prior to that transaction, in August 1996, the predecessor withdrew recognition of the union based on a petition it received from a group of employees. The union then filed charges challenging the withdrawal of recognition. In April 1997, while those charges were pending, a decertification petition signed by a majority of employees was filed with the Board. Then, in May 1997, the predecessor entered into a settlement agreement to resolve the pending charges, and agreed to bargain with the union. The decertification petition was then dismissed because of the settlement agreement. *Murrysville*, 330 NLRB at 1119.

The Board held that the successor employer could not rely on the August 1996 petition to justify its refusal to recognize the union because the petition was more than a year old in October 1997, and also held that the successor could not rely on the April 1997 decertification petition because "the petition had been dismissed by the Regional Director in light of his approval of an agreement settling the unfair labor practice charges filed by the Union against the Respondent's predecessor." *Id.* at 1120. Moreover, that petition was tainted because the "alleged employer misconduct had taken place before the filing of that petition." *Id.* The Board concluded, "The timing of those events thus gave rise to the presumption that the employees' disaffection from the Union arose from the alleged misconduct of the predecessor, in derogation of the bargaining relationship." *Id.* Thus, the Board's decision in *Murrysville* was closely tied to the specific facts of that case, and cannot be read as even "suggesting" a general rule that a successor employer

may never rely on signatures on a petition gathered when the business was operated by a predecessor.

Moreover, the ALJ's "presumption" that the August 2017 Petition was premised on employees' dissatisfaction only with SEIU's dealings with the predecessor was directly contrary to the only evidence presented on this point. Contrary to the ALJ's conclusion, Jennifer D'Angelo clearly testified that she had not changed her mind about union representation since she signed the August 2017 Petition. (Tr. 54:1-9). More importantly, Loan Tran, who began working in mid-October 2017 ***after*** the change ownership, testified on cross-examination by the Union's attorney that she became dissatisfied with the union's representation during the seven months between the date she was hired and the date she signed the April 2018 Petition. (Tr. 59:4-10). There was absolutely no evidence presented at the hearing that any employee who expressed his or her dissatisfaction with the Union by signing the August 2017 Petition had a different view of the Union after the October 1, 2017 transaction.[11] Thus, the ALJ's conclusion that Jennersville could not rely on the August 2017 Petition was based on a presumption that is unsupported by either the law or the facts of this case.

The ALJ also attempted to justify his conclusion that Jennersville could not rely on the August 2017 Petition by asserting that "a "concerted effort to obtain a majority of unit employees signatures on a petition in the month prior to withdrawal had failed" despite the "prodigious efforts" made by anti-union employees. (ALJ Decision p. 6, lines 26-27, 40). According to the ALJ, "there is a strong indication that proponents of decertification were unable

[11] The ALJ found that there was "no evidence that any employees were told that since they signed the August petition, it was not necessary for them to sign the April petition." (ALJ Decision p. 6, lines 43-44). This point is irrelevant and does not in any way establish that any employees who signed the August 2017 Petition but did not sign the April 2018 Petition had changed their minds about continued union representation.

to get many of the employees who signed the August 2017 petition to sign the April 2018 petition." (ALJ Decision p. 7, lines 21-23). There is no evidence to support the ALJ's characterization of the efforts of employees to obtain signatures in April 2018, or his speculation that employees were unable to get employees who had signed in August 2017 to sign again.

The evidence of the so-called "prodigious efforts" made by employees in April 2018 consisted entirely of Donna Rahner's testimony that she "left copies [of the petition] for people to go in on their breaks to sign …" (Tr. 33:17-18; 36:18-25), and that when she came back into the building, she would collect the pages she had left out. (Tr. 37:1-3). Ms. Rahner also testified that if people told her they were interested in signing, she would tell them that "the papers are in the break room. On your break, you can go sign." (Tr. 39:22-24). There was no other testimony about the process of obtaining signatures on the April 2018 Petition.

Thus, rather than "prodigious efforts" to convince employees to sign the April 2018 Petition as portrayed by the ALJ, the record established only that there had been a very passive campaign that consisted merely of leaving copies of the petition out in a break room for employees to sign. There was no testimony that Ms. Rahner or any other employee approached other employees in an effort to convince them that they needed to sign a petition a second time. Likewise, there was no evidence that any employee who signed the August 2017 Petition refused a request that he or she sign the April 2018 Petition. Nor was there any other evidence that employees who signed the August 2017 Petition had changed their minds about the Union. In that regard, there was no evidence that employees who signed the August 2017 Petition later signed union authorization cards, or that they had signed a counter petition in support of the Union. Nor was there any evidence that any employee who had signed the August 2017 Petition

made any attempt to rescind his or her signature. In short, the ALJ relied entirely on his own speculation to support his desired outcome.

Finally, the ALJ concluded that the fact "Respondent or the anti-union employees could also have clarified the desires of employees by petitioning the Board for a decertification election … is also a reason not to allow Respondent to rely on the August 2017 petition in withdrawing recognition." (ALJ Decision p. 5, lines 19-21). But, an employer would have the right to file such a petition in any situation where the employer is presented with a petition from what appears to be a majority of employees stating that they no longer want union representation. The availability of this option has absolutely nothing to do with whether the signatures on the August 2017 Petition were valid at the time Jennersville withdrew recognition. Indeed, because the option to file a petition would always be available, the ALJ's reasoning would invalidate ***any*** withdrawal of recognition based on a receipt of a petition demonstrating the lack of majority support. The ALJ's conclusion on this point further demonstrates his bias against the very idea of a lawful withdrawal of recognition.

E. If The Board Finds That Jennersville Unlawfully Withdrew Recognition, The Proper Remedy Is An Election.
(Exceptions 32 through 40)

For the reasons set forth at length above, Jennersville's decision to withdraw recognition from SEIU was lawful, and the ALJ's decision to the contrary should be reversed. However, should the Board determine that the Hospital's withdrawal of recognition was improper, the appropriate remedy is an election, not a bargaining order. The ALJ's order requiring the Hospital to bargain with the Union should be vacated and an election should be ordered.[12]

[12] To the extent that current Board law requires a bargaining order for a violation of Section 8(a)(5), Respondent respectfully submits that the Board should adopt the three part test articulated by the D.C. Circuit, which balances: (1) the employees' Section 7 rights of self-organization and collective bargaining; (2) whether other purposes of the Act override the rights

"[A] bargaining order is not a snake-oil cure for whatever ails the workplace[.]" *Avecor, Inc. v. NLRB*, 931 F.2d 924, 938-39 (D.C. Cir. 1991). It therefore should be prescribed only when the employer has committed a "[h]allmark violation" of the Act. *Id.* at 934, 936. It should not be imposed if the violation is "far from serious." *Skyline Distribs. v. NLRB*, 99 F.3d 403, 410 (D.C. Cir. 1996). Severity depends on whether the ULP was "the genesis of [the] employees' desire to rid themselves of" the union, and whether it was so "flagrant" that an election cannot fairly be held. *Daisy's Originals, Inc. v. NLRB*, 468 F.2d 493, 502-03 (5th Cir. 1972).

The D.C. Circuit's decision in *Scomas of Sausalito v. NLRB*, 849 F.3d 1147 (D.C. Cir. 2017) is instructive. In *Scomas*, employees collected signatures from a majority of bargaining unit employees on a decertification petition, filed the petition with the Region asking for an election, and also gave a copy of the petition to the employer requesting that it withdraw recognition. *Id.* at 1147. However, before the employer withdrew recognition, the union persuaded six employees to revoke their signatures on the decertification petition. *Id.* at 1153. Without those six signatures, the decertification petition was not supported by a majority of employees, but was still supported by well over 30% of the bargaining unit. *Id.* at 1158. The union did not inform the employer that the six employees had revoked their signatures on the decertification petition, nor did it inform the employee who filed the petition with the NLRB. Without knowing about the revoked signatures, the employer proceeded to withdraw recognition in good faith based on the petition it had received and, based on the withdrawal of recognition, the petitioning employee withdrew the decertification election petition. *Id.*

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of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act. *See Scomas of Sausalito v. NLRB*, 849 F.3d 1147 (D.C. Cir. 2017).

Six days later, the union filed unfair labor practice charges claiming that the employer unlawfully withdrew recognition because the union still enjoyed support of a majority of the bargaining unit. The Board found that the employer's withdrawal of recognition was unlawful, and imposed a bargaining order which prevented the employer and the dissenting employees from "raising a question concerning the Union's majority status during the required bargaining period." *Id.* at 1154. The D.C. Circuit reversed the Board's imposition of a bargaining order, explaining that an "affirmative bargaining order is an extreme remedy, because according to the time-honored board practice it comes accompanied by a decertification bar that prevents employees from challenging the Union's majority status for at least a reasonable period." *Id.* at 1156 (quoting *Caterair Int'l v. NLRB*, 22 F.3d 1114, 1122 (D.C. Cir. 1994)). The Court explained that the appropriate remedy when the decertification petition is supported by more than 30% of the bargaining unit employees is to order an election. *Scomas*, 849 F.3d at 1156.

The same analysis applies in this case. For the reasons set forth above, the ALJ erred in holding that Jennersville improperly relied on signatures that appeared on the four pages of the petition that lacked the explanatory header, as well as the remaining pages of the August 2017 petition. However, without considering the signatures on those pages, there were still 31 employees out of the 88 employees in the bargaining unit (or just over 35%) who signed petitions seeking a decertification election or the withdrawal of recognition from the Union. Moreover, this case does not involve any other allegations of unfair labor practices, much less "hallmark" violations of the Act that could have influenced the employees' disaffection with the Union. Under these circumstances, where even the ALJ's improper analysis of the Petitions established that 35% of the bargaining unit no longer wanted to be represented by the Union, the issuance of a bargaining order would improperly override the Section 7 rights of a substantial

number of Hospital employees. "The fundamental policies of the Act are to protect employees' rights to choose or reject collective-bargaining representatives, to encourage collective bargaining, and to promote stability in bargaining relationships." *HTH Corp.*, 356 NLRB 1397, 1428 (2011). As the D.C. Circuit explained in *Scomas*, a bargaining order in this case would prevent the Hospital employees from "dislodg[ing] the union" no matter "their sentiments about it." *Scomas*, 849 F.3d at 1156 (*quoting Caterair Int'l*, 22 F.3d at 1122). Therefore, the appropriate remedy in this case would be to order an election so as to permit the employees in the bargaining unit to express their desire (or not) to be represented. *Scomas*, 849 F.3d at 1156. Imposing a bargaining order "give[s] no credence whatsoever to employee free choice" and "handcuff[s]" the employees "for no good record-based reason." *Scomas*, 849 F.3d at 1158.[13]

[13] The ALJ's justification for a bargaining order is pure boilerplate and does not even attempt to identify any particular facts or evidence in this case that would support imposition of a bargaining order that would unquestionably override the expressed desires of a substantial number of bargaining unit employees.

V. CONLUSION

For all of the foregoing reasons, Respondent Jennersville Hospital, LLC respectfully requests that the ALJ's decision in this case be reversed and that the Complaint issued in this matter be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Andrew J. Rolfes, Esquire, hereby certify that on this 8th day of May, 2019, I caused a true and correct copy of the foregoing Respondent's Brief in Support of Exceptions to Administrative Law Judge's Decision to be served by e-mail and first class mail on the following:

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